William S. Boggs (Bar No. 053013)
william.boggs@dlapiper.com
Noah A. Katsell (Bar No. 217090)
noah.katsell@dlapiper.com
DLA PIPER US LLP
401 B Street, Suite 1700
San Diego, CA 92101-4297
Tel: 619.699.2700
Fax: 619.699.2701

Amy Weinfeld Schulman (Pro hac vice application pending)
amy.schulman@dlapiper.com
DLA PIPER US LLP
1251 Avenue of the Americas
New York, NY 10020-1104
Tel: 212.335.4500
Fax: 212.335.4501

Attorneys for Defendant
Kraft Foods Global, Inc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ADRIANNE SMITH, as an individual and on behalf of all others similarly situated,

Plaintiff,

v.

KRAFT FOODS GLOBAL, INC., a Delaware corporation,

Defendant.

CASE NO. 07 CV 2192 BEN (WMC)

Assigned to Hon. Roger T. Benitez

DEFENDANT KRAFT FOODS GLOBAL, INC.'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN FURTHER SUPPORT OF ITS MOTION TO DISMISS FIRST AMENDED COMPLAINT

Date: May 19, 2008
Time: 10:30 a.m.
Place: Courtroom 3

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I. Introduction

Kraft's opening brief demonstrated that there is far less to this case than Plaintiff would have this Court believe. Plaintiff's Opposition does nothing to remedy the multiple deficiencies in her claims, and Plaintiff fails to state a viable cause of action under any theory.

The material—and dispositive—facts in this case are both simple and uncontested. Plaintiff purchased an inexpensive package of Jell-O dry pudding mix, a product that has been familiar to consumers for decades. The package included an FDA-defined nutrient content claim stating that each serving of pudding provides 10% to 19% of the daily recommended intake of calcium. The package indicated on almost every surface that the pudding is prepared by mixing the dry powder in the box with milk, and some packages feature a front-panel image of milk pouring into a bowl of pudding mix. Plaintiff prepared the pudding with milk as directed, and Plaintiff ate pudding that provided her with 150 milligrams of calcium per serving, or 15% of the daily recommended intake of calcium.[1]

Thus, Jell-O pudding delivered the benefit that was promised, and Plaintiff received exactly what she paid for. Plaintiff cannot dispute that the federally regulated calcium claim on Jell-O—"A Good Source of Calcium as Prepared"—is a true and accurate statement. Nor can she dispute that she received the precise calcium benefit promised by the claim. Plaintiff suffered no injury and has no basis now to complain.

Unable to contest these essential facts, it is no surprise that Plaintiff's Opposition is left to reproduce long passages from her First Amended Complaint ("Complaint") and to plead for "the opportunity to engage in discovery" to "prove her claims." Pl.'s Br. at 8.[2] However, because each of Plaintiff's causes of action fails as a matter of law and cannot be cured by further amendment, the Court should end this lawsuit and dismiss the Complaint with prejudice.

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[1] Jell-O pudding can only be made with milk. Other liquids like water or soy-milk will not "set" and create pudding.

[2] Notably, Plaintiff misstates the operative pleading standard, arguing that this Court cannot dismiss her Complaint "unless it appears beyond doubt that plaintiff[] can prove no set of facts in support of [her] claim which would entitle [her] to relief." Pl.'s Br. at 5. In Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1967–69 (2007), however, the U.S. Supreme Court expressly disapproved the "no set of facts" standard and rejected the proposition that a case should proceed to discovery despite insufficient allegations in the complaint. Indeed, the Court stated that if a complaint does not "raise a right to relief above the speculative level," then "this basic deficiency should … be exposed at the point of minimum expenditure of time and money by the parties and the court." Id. at 1965–66.

II. Plaintiff's Claims Are Preempted Because She Seeks To Impose Requirements That Are Not Identical To The Requirements Imposed By Federal Law

Plaintiff's Complaint attacks a federally defined nutrient content claim under the Food, Drug, and Cosmetic Act ("FDCA") and the corresponding regulations promulgated and enforced by the Food and Drug Administration ("FDA"). Plaintiff attempts to impose requirements for nutrient content claims that are not identical to the requirements imposed by federal law. Accordingly, her claims are preempted.

A. Jell-O Makes A Federally Defined And Regulated Nutrient Content Claim

In 1990, Congress amended the FDCA to, among other things, regulate the use of nutrient content claims on food labels. See Pub. L. No. 101-535, 104 Stat. 2535 (1990). According to the House Report accompanying the bill, the legislation was designed "to establish the circumstances under which claims may be made about nutrients in foods." H.R. Rep. No. 101-538, at 7 (1990), reprinted in 1990 U.S.C.C.A.N. 3336, 3337. Under 21 U.S.C. § 343(r), a food is misbranded if "a claim is made in the label or labeling of the food which expressly or by implication … characterizes the level of any nutrient" unless "the characterization of the level made in the claim uses terms which are defined in regulations of the Secretary." 21 U.S.C. §§ 343(r)(1)(A), (2)(A)(i). Pursuant to § 343(r), the FDA enacted regulations governing nutrient content claims, including uniform definitions of descriptors, such as "good source," and their use to describe particular nutrients, such as calcium. See, e.g., 21 C.F.R. §§ 101.13 (providing general principles for nutrient content claims), 101.54 (providing rules for "good source" claims).

The calcium claim on Jell-O packages complies with the requirements imposed by federal law. Under the regulations, "[t]he term[] 'good source' … may be used … provided that the food contains 10 to 19 percent of the RDI … per reference amount customarily consumed." Id. § 101.54(c). The regulations further explain that the RDI—or "Reference Daily Intake"—for calcium is 1,000 milligrams, id. § 101.9(c)(8)(iv), and that the "reference amount customarily consumed" for pudding is "1/2 cup," id. § 101.12(b). The regulations are clear that "the reference amount customarily consumed set forth in § 101.12(b) … shall be used in determining whether a product meets the criteria for a nutrient content claim." Id. § 101.13(p)(1). The rules specifically

contemplate presenting nutrition information for "as prepared" forms of foods: the regulations expressly provide that "[n]utrition information may be presented for two or more forms of the same food (e.g., both 'as purchased' and 'as prepared')," with information for the two forms of the food presented in multiple columns in the label's "Nutrition Facts" panel. Id. § 101.9(e).

Thus, subject to requirements not applicable here, a pudding may be labeled a "good source of calcium" if it provides between 100 milligrams and 190 milligrams of calcium per 1/2-cup serving. Jell-O pudding provides 150 milligrams of calcium per 1/2-cup serving and is a good source of calcium. As provided by the regulations, Jell-O's "Nutrition Facts" panel presents nutrition information in a dual column format: one column providing nutrient content "As Packaged," the other providing nutrient content when "Prepared With 2% Reduced Fat Milk."

B. Federal Nutrition Labeling Law Preempts Plaintiff's Claims

Congress has broadly preempted states from regulating nutrient content claims: "no State or political subdivision of a State may directly or indirectly establish under any authority … any requirement respecting any claim of the type described in section 343(r)(1) of this title, made in the label or labeling of food that is not identical to the requirement of section 343(r) …." 21 U.S.C. § 343-1(a)(5). Thus, states are precluded from establishing requirements for nutrient content claims unless the requirements are identical to those required by section 343(r) and the regulations established by the FDA. This provision preempts non-identical state requirements imposed by litigation judgments as well as by legislative enactments. See Medtronic v. Lohr, 518 U.S. 470, 503, 510 (1996); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 521, 548–49 (1992).

Plaintiff does not—and cannot—dispute that the calcium content claim on Jell-O pudding meets the requirements established by the FDCA and the FDA. Yet, Plaintiff contends that this nutrient content claim is improper, and she is prosecuting this litigation to enjoin its use. Thus, she seeks to establish requirements for this nutrient content claim that are not identical to the requirements established by Congress and the FDA. Accordingly, her claims are preempted by section 343-1(a)(5).[3]

[3] Plaintiff directs her argument at "Kraft's apparent reliance on 21 U.S.C. § 337," a provision not cited in Kraft's opening brief. Pl.'s Br. at 16. Kraft respectfully submits that Plaintiff's claims are preempted for the reasons detailed in its opening brief. Plaintiff's claims are also preempted for the independent reasons discussed herein.

Plaintiff is mistaken that the California Supreme Court's recent decision in In re Farm Raised Salmon Cases, 42 Cal. 4th 1077 (2008), rescues her claims from preemption. In fact, Farm Raised Salmon is a precise illustration of why Plaintiff's claims are preempted here.

In Farm Raised Salmon, the defendants sold seafood that contained the chemical color additives astaxanthin and canthaxanthin; however, contrary to state and federal law, the defendants did not declare on packaging that the fish was artificially colored. 42 Cal. 4th at 1082–84. This conduct violated food labeling requirements found in both the FDCA and parallel provisions of California's Sherman Food, Drug, and Cosmetic Law. Id. The Court recognized that 21 U.S.C. § 343-1(a) is "an explicit preemption provision" that precludes states from establishing artificial-color labeling requirements that are not identical to the requirements under federal law. The litigation was not preempted, however, because the plaintiffs' claims were based on labeling requirements under the Sherman Law that were identical to the requirements imposed by federal law. While it was true that the defendants' conduct violated both federal and state labeling laws, the plaintiffs were seeking to enforce only the requirements imposed by the Sherman Law, which were identical to the requirements imposed by the FDCA.

Plaintiff's claims here are the inverse of those alleged in Farm Raised Salmon. Plaintiff does not—and cannot—allege that the "good source" nutrient content claim on Jell-O does not meet the requirements established by the FDCA and the FDA. Yet, she asserts that this federally regulated and federally compliant nutrient content claim violates California statutes and common law. Thus, her litigation attempts to impose state requirements for a nutrient content claim that are not identical to the requirements imposed by federal law. Accordingly, her action challenging this nutrient content claim is preempted.[4]

III. Plaintiff Cannot Allege That Jell-O Is Likely To Deceive A Reasonable Consumer

Plaintiff fails to assert, as she must under the Unfair Competition Law ("UCL"), False

[4] The cases cited by Plaintiff are in accord, and none supports her assertion that her claims escape preemption here. For example, in McKell v. Washington Mut., Inc., 49 Cal. Rptr. 3d 227, 250–51 (2006), the plaintiffs were using the UCL "to enforce federal law governing the operation of federal savings associations." As Plaintiff herself concedes, however, if she were using the UCL to enforce the FDCA, her claims clearly would be preempted. See Pl.'s Br. at 15 n.14 (citing Farm Raised Salmon, 2008 WL 351637, at *11 (explaining that claims "based on violations of the FDCA" are preempted)).

Advertising Law ("FAL"), and Consumer Legal Remedies Act ("CLRA"), that the calcium claim on Jell-O pudding "is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." Lavie v. Procter & Gamble Co., 105 Cal. App. 4th 496, 508 (2003) (emphasis added).

Plaintiff cannot dispute that Jell-O pudding is "A Good Source of Calcium as Prepared." As provided by FDA food labeling laws, Jell-O pudding is a "good source" of calcium because each serving of pudding provides 15% of the daily recommended intake of calcium.[5] Plaintiff is demonstrably wrong when she states that Jell-O has "absolutely no nutritional value as a dietary source of calcium." Pl.'s Br. at 5. If Plaintiff ate Jell-O pudding, she received 150 milligrams of calcium per 1/2-cup serving. Plaintiff may disagree with the FDA's judgment that 150 milligrams of calcium per 1/2 cup is sufficient to qualify as a "good source" of calcium, but simply asserting that a true and accurate statement is a "misrepresentation" does not make it so.[6] Thus, Plaintiff is left to base this entire litigation on the incredible contention that the statement "A Good Source of Calcium as Prepared" led her to believe the product was a good source of calcium "as sold." Id. at 4.

Plaintiff's singular reliance on Williams v. Gerber Prods. Co., 2008 WL 1776522 (9th Cir. Apr. 21, 2008)—an opinion issued after Kraft filed its motion to dismiss that reversed a district court decision that Kraft did not rely on in its opening brief—is misplaced. Pl.'s Br. at 1, 5–8.

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[5] Because Jell-O labels comply with applicable FDA labeling regulations, Plaintiff cannot state a claim under the UCL's "unlawful," "unfair," or "deceptive" prongs. "A business practice that might otherwise be considered unfair or deceptive cannot be the basis of a section 17200 cause of action if the conduct has been deemed lawful." Byars v. SMCE Mortgage Bankers, Inc., 109 Cal. App. 4th 1134, 1147–48 (2003) (explaining that the defendant's alleged conduct "was lawful and therefore cannot constitute the basis of a 17200 claim"); see also Blank v. Kirwan, 39 Cal. 3d 311, 329 (1985) (finding that plaintiff did not state a cause of action under the UCL because defendant's alleged conduct was not forbidden by underlying law); Hobby Indus. Ass'n of Am. v. Younger, 101 Cal. App. 3d 358, 370 (1980) (explaining that defendant was "immune" from actions under the UCL because the UCL does not "encompass[] business practices which the Legislature has expressly declared to be lawful in other legislation") (citations omitted); Walker v. Allstate Indemnity, Co., 77 Cal. App. 4th 750, 756–58 (2000).

[6] Similarly, Plaintiff is wrong that it is "false" for Kraft's website to state that a 1/2-cup serving of Jell-O pudding contains 150 milligrams of calcium. Pl.'s Br. at 3, 7. This statement, which Plaintiff does not even allege she relied on, is true. And Plaintiff's suggestion that Kraft's line of ready-to-eat pudding cups somehow "create[s]" "confusion" is equally off point. Id. at 8. Kraft's ready-to-eat pudding is a completely different product line with no relevance here—even if Plaintiff could allege that she relied on the ready-to-eat pudding label when she purchased the dry powder product at issue here, which she does not. Moreover, the ready-to-eat and dry mix pudding products both provide a "good source" of calcium per serving. But the claim on the ready-to-eat product, which requires no preparation and is eaten "as is," never included the words "as Prepared."

Indeed, the Ninth Circuit's analysis Gerber actually supports dismissal of Plaintiff's claims here.

In Gerber, the defendant sold "Fruit Juice Snacks" as part of its "Graduates for Toddlers" product line. Gerber, at *1. The label included the "words 'Fruit Juice' juxtaposed alongside images of fruits such as oranges, peaches, strawberries, and cherries," but the product did not contain any juice from the fruits represented. Id. The district court found that the plaintiffs could not have been deceived because the fruits depicted on the front of the package were not present in the ingredient list on the side of the box. Id. at *4. The Ninth Circuit disagreed.

The court recognized that unfair competition claims like those asserted here may be dismissed under Rule 12(b)(6) without reference to anything other than the advertisement itself. Id. at *3. As an example, the court cited its decision in Freeman v. Time, Inc., 68 F.3d 285 (9th Cir. 1995), where a sweepstakes mailer informed the plaintiff that he had won a million dollars. However, because the document also informed him that he would win the prize only if he had the winning sweepstakes number, "the advertisement itself made it impossible for the plaintiff to prove that a reasonable consumer was likely to be deceived." Id. at *3.

In contrast, the court found that the representations made by Gerber required a different result. The Gerber label included "a number of features … which could likely deceive a reasonable consumer." Id. at *4. Specifically, the court found that four separate representations made in various places on the Gerber package contributed to potential deception: (1) the product was called "Fruit Juice Snacks"; (2) the package included depictions of numerous fruits "potentially suggesting (falsely) that those fruits or their juices are contained in the product"; (3) the statement that the product was made with "'fruit juice and other all natural ingredients' could easily be interpreted by consumers as a claim that all the ingredients in the product were natural, which appears to be false"; and (4) the claim "'just one of a variety of nutritious Gerber Graduates foods and juices that have been specifically designed to help toddlers grow up strong and healthy' adds to the potential deception." Id. The court found that the cumulative effect of these multiple representations, some that appeared to be false, could not be cured by requiring "a busy parent walking through the aisles of a grocery story" to verify—from the absence of certain fruits in the ingredient list—whether the representations were true or false. Id.

Contrary to Plaintiff's argument, this analysis supports dismissal here. Unlike Gerber, where the package contained multiple representations, including some that appeared to be false, Jell-O labels include only one representation, and that representation is true and accurate. Further, Jell-O's calcium claim stands on its own without reference to other parts of the package. Kraft does not argue that a consumer is expected to read other information on the package in order to determine whether Jell-O is "A Good Source of Calcium as Prepared." That claim is a true, declarative statement, and there is no suggestion that a consumer must evaluate it by reading information provided elsewhere on the box, much less that a consumer is required to draw a negative inference about Jell-O's contents from the absence of ingredients in the ingredients list.

Of course, unlike Gerber, a "busy parent walking through the aisles of a grocery store" must at some point read other parts of the Jell-O label, otherwise he or she will not be able to prepare Jell-O pudding. And, while Jell-O's FDA-required "Nutrition Facts" panel affirmatively states that the product contains "0" calcium "As Packaged," this information is not necessary to verify that the calcium claim is true. Rather, as the Ninth Circuit directs, Jell-O's label "contains more detailed information about the product that confirms other representations on the packaging." Id. (emphasis supplied). As contemplated by the FDA's regulations, a consumer who, like Plaintiff, is "conscientious about [her] diet[] and fully aware of the importance of calcium," Pl.'s Br. at 4, can refer to the "Nutrition Facts" panel to learn the precise calcium content of each serving of pudding. Thus, as in Freeman, the "more detailed information" on the Jell-O package "itself ma[kes] it impossible for the plaintiff to prove that a reasonable consumer was likely to be deceived." See Gerber at *3. Because Plaintiff cannot allege that the Jell-O calcium claim is likely to deceive a reasonable consumer, her UCL, FAL, and CLRA claims should be dismissed.[7]

[7] Plaintiff does not dispute that California courts have dismissed UCL, FAL, and CLRA claims as a matter of law under similar circumstances. See, e.g., Haskell v. Time, Inc., 857 F. Supp. 1392, 1399, 1399–1403 (E.D. Cal. 1994) (sweepstakes mailer included official rules); Plotkin v. Sajahtera, Inc., 106 Cal. App. 4th 953, 965–66 (2003) (extra fees for parking service disclosed on parking ticket); Shvarts v. Budget Group, Inc., 81 Cal. App. 4th 1153, 1158–60 (2000) (rental car refueling charges were printed in the rental agreement); see also Whitaker v. Tandy, Corp., 1997 U.S. Dist. LEXIS 17085, at *8 (N.D. Cal. Oct. 31, 1997); Belton v. Comcast Cable Holdings, LLC, 151 Cal. App. 4th 1224, 1241–42 (2007); Bardin v. DaimlerChrysler Corp., 136 Cal. App. 4th 1255, 1274–76 (2006); Van Ness v. Blue Cross of California, 87 Cal. App. 4th 364, 376–77 (2001).

IV. "Calci-YUM!" Is Non-Actionable Puffery

Plaintiff's Opposition confirms that the advertising word "Calci-YUM!" is puffery. Plaintiff argues implausibly that "Calci-YUM!," a fanciful marketing word, can be a "specific, quantifiable claim." Pl.'s Br. at 8. Plaintiff's reliance on the Ninth Circuit's recent Gerber decision on this point is unavailing, as that opinion illustrates why "Calci-YUM!" is puffery. In Gerber, the court suggested that the term "nutritious" may, under certain circumstances, constitute puffery "since nutritiousness can be difficult to measure concretely." 2008 WL 1776522, at *4 n.3; see also Pl.'s Br. at 9. "Nutritious," however, is an English word with an easy-to-find definition, and the concept is at least capable of measurement. "Calci-YUM!," in contrast, has no definition and cannot be measured or understood to establish any standard. Cf. Consumer Advocates v. Echostar Satellite Corp., 113 Cal. App. 4th 1351, 1361 (2003) (puffery constitutes statements that are "not factual representations that a given standard is met" but "boasts, all-but-meaningless superlatives ... which no reasonable consumer would take as anything more weighty than an advertising slogan"). The marketing word "Calci-YUM!" is non-actionable puffery, and Plaintiff's claims premised on it should be dismissed.

V. Plaintiff Fails To Allege Damages For Any Of Her Claims

Plaintiff is wrong that she adequately pleads damages, a deficiency that her Opposition cannot remedy by repeating the insufficient allegations from her Complaint. Pl.'s Br. at 9–12.

Plaintiff purchased a package of dry pudding mix promising to provide between 10% and 19% of the daily value of calcium per 1/2-cup serving of pudding. Plaintiff does not—and cannot—deny that this is precisely what she received. Plaintiff has not alleged, as she must, that the product she bought was worth less than she paid for it. As Kraft demonstrated in its opening brief, this alone renders each of Plaintiff's causes of action fatally deficient. Def.'s Br. at 9–10 (UCL, FAL, CLRA); id. at 12–13 (misrepresentation); id. at 15 (warranty).

It is nonsensical for Plaintiff to argue that she suffered damages because she "had to pay a hidden price for the separate purchase of milk." Pl.'s Br. at 19. First, there is nothing "hidden" about the fact that Plaintiff had to purchase milk if she wanted to make Jell-O pudding. A consumer purchasing a 3-ounce box of dry powder that makes 2 cups of pudding—particularly

one labeled "Instant" or "Cook & Serve"—understands that other ingredients will be required. Jell-O packages explain that milk is required to make pudding on virtually every surface: on the top, side, back, and bottom of the box. The front panel of the Cook & Serve variety actually shows milk being poured into the mixture. Moreover, Plaintiff did not need milk simply to get the calcium benefit, she needed milk in order to make pudding at all.[8] The pudding's calcium benefit is inherent in the product when prepared as it must be in order to make pudding. Plaintiff needed to purchase milk to make pudding, irrespective of the calcium claim.

Contrary to Plaintiff's assertion, the Northern District's decision in Chavez v. Blue Sky Natural Beverage Co., 2007 WL 1691249, at *4 (N.D. Cal. June 11, 2007), is instructive. As Plaintiff does here, the plaintiff in Chavez alleged that the product he purchased was worthless to him, and that his damages were the full purchase price, because he would not have purchased the beverage if he had known that the claim on the label was false. Id. at *2. The court found this allegation insufficient to allege damages under the UCL, the FAL, the CLRA, or for common law fraud. The plaintiff "did not pay a premium" because of the label claim, so he could "not allege damages resulting from" the defendants' false label. Id. at *3 (emphasis added). And it was insufficient for the plaintiff to allege, as Plaintiff does here, that he bought the product only because of the claim. Because the plaintiff could not allege that the beverage he purchased was worth less than he paid for it, his allegations were deficient, and the court dismissed the case with prejudice. Id. at *4.

The Jell-O calcium claim is true, and Plaintiff received the calcium benefit promised on the label. Her assertions that she would not have purchased the product, and that the product had "no value to her," are insufficient. She did not pay a premium because of the calcium claim, and she cannot allege that there was any difference in value between what she was promised and what she received. Thus, all of her claims must be dismissed.

[8] Thus, Plaintiff's argument that "anything could be marketed as a 'good source of calcium' as long as the consumer was directed to add milk" is a red herring. Pl.'s Br. at 3. Jell-O pudding can be made only with milk, and Jell-O pudding, when made as it must be made, is a "good source" of calcium. It is irrelevant for Plaintiff to suggest that a consumer might "believe" that the preparation instructions "could be[] 'just add water.'" Id. at 6. If a consumer wants to eat Jell-O pudding, he or she must read the directions and must prepare the pudding with milk.

VI. Plaintiff Ignores Kraft's Arguments Against Her Fraud And Warranty Claims

Plaintiff's Opposition ignores entirely the multiple grounds for dismissing her claims for negligent and intentional misrepresentation and breach of express warranty. As explained in Kraft's opening brief, Plaintiff does not—and cannot—state a claim under any of these theories. See Def.'s Br. at 10–12 (negligent and intentional misrepresentation), 14–15 (express warranty). Plaintiff's silence in her Opposition confirms that her fraud and warranty claims should be dismissed with prejudice.

VII. Plaintiff Fails To Plead Her Fraud Claims With Sufficient Particularity

Plaintiff's Opposition does nothing to cure her fraud allegations, which fail to meet the particularity requirements of Rule 9(b). Plaintiff asserts only that "during the past four years" Kraft represented "Calci-YUM! A Good Source of Calcium as Prepared" "to the public" "at each and every point of sale by means of labeling." Pl.'s Br. at 4, 18. These general, conclusory allegations do not "put Kraft on notice of the exact scope and nature of the claims asserted." Pl.'s Br. at 19. Further, Plaintiff fails to advance any plausible explanation for her fundamental allegation that the statement "A Good Source of Calcium as Prepared" led her to believe that Jell-O was "A Good Source of Calcium as Packaged." Plaintiff has not pleaded her fraud claims with sufficient particularity, and they should be dismissed.

VIII. Conclusion

Plaintiff's UCL, FAL, CLRA, misrepresentation, and warranty claims fail because each lacks one or more essential elements that Plaintiff does not and cannot allege, and the deficiencies in her claims cannot be cured by further amendment. Accordingly, Defendant requests that the Court grant its motion to dismiss with prejudice.

Dated: May 12, 2008

DLA PIPER US LLP

s/Noah A. Katsell
Attorneys for Defendant Kraft Foods Global, Inc.
E-mail: noah.katsell@dlapiper.com